EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASNINGYON, DC INTERNATIONAL

May 26, 2009

VIA HAND DELIVERY
Laura H. Thielen, Chairperson
Ken C. Kawahara, Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawai'i 96809

Re: Comments and Objections on Surface Water Use Permit Applications (Existing Uses) for Nā Wai 'Ehā Surface Water Management Areas, Maui

Dear Chair Thielen and Deputy Director Kawahara:

On behalf of Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc. (together, the "Community Groups"),[1] we respectfully submit the following comments and objections in response to the correspondence from the Commission dated April 29, 2009, regarding thirteen Surface Water Use Permit Applications ("WUPAs") for existing uses of water from Nā Wai 'Ehā's surface water management areas:

A. General Comments.

1. Action on the WUPAs must await pending IIFS proceedings.

Initially, as the Commission is well aware, proceedings on the Interim Instream Flow Standards ("IIFS") for Nā Wai 'Ehā streams are ongoing, with the Commission's Hearings Officer's April 9, 2009 Proposed Findings of Fact, Conclusions of Law, and Decision and Order pending the Commission's final decision. The Hawai'i Supreme Court has made clear that the

[1] Hui o Nā Wai 'Ehā and Maui Tomorrow are parties with established standing in ongoing proceedings on the waters of Nā Wai 'Ehā, or Waihe'e River and Waiehu, 'Īao, & Waikapū Streams. Hui o Nā Wai 'Ehā is a community-based organization that was formed to promote the conservation and appropriate management of Hawai'i's natural and cultural resources and the practices that depend on them, including traditional and customary Native Hawaiian practices. Maui Tomorrow, a community based-organization with over 1,000 supporters, is dedicated to protecting Maui's natural areas and prime open space for recreational use and aesthetic value, promoting the concept of ecologically sound development, and preserving the opportunity for rural lifestyles on Maui. Hui members and Maui Tomorrow supporters rely on, routinely use, or seek to use surface water from the Waihe'e, Waiehu, 'Īao, and Waikapū surface water management areas and their nearshore marine waters for fishing, swimming, agriculture, aquaculture, research, photography, educational programs, aesthetic enjoyment, traditional and customary Native Hawaiian practices, and other recreational, scientific, cultural, educational and religious activities.

223 SOUTH KING STREET, SUITE 400 HONOLULU, HI 96813-4501
T: 808.599.2436 F: 808.521.6841 E: mpoffice@earthjustice.org W: www.earthjustice.org

Commission must set instream flow standards "first," "as early as possible, during the process of comprehensive planning, and particularly before it authorizes offstream diversions potentially detrimental to public instream uses and values." In re Waiāhole Ditch Combined Contested Case Hr'g, 94 Haw. 97, 148, 156, 9 P.3d 409, 460, 468 (2000) ("Waiāhole I"). Existing offstream uses of Nā Wai 'Ehā water already drain the streams dry and, thus, are not only "potentially," but actually, detrimental to public instream uses and values. Moreover, existing uses are not "grandfathered" under the Code, and "the Commission's duty to establish proper instream flow standards continues notwithstanding existing diversions." Id. at 149-50, 9 P.3d at 461-62. Until the Commission establishes proper IIFS, it cannot determine whether any water will be available for the various existing and new use WUPAs. See Haw. Rev. Stat. §§ 174C-50(h), -54 (provisions for managing "competing" uses that exceed the available quantity of water). Thus, pursuant to its legal obligations under the public trust and Code, the Commission should withhold any action on the WUPAs until it completes the pending IIFS proceeding.

2. Applicants claiming appurtenant rights must provide prima facie evidence of those rights.

The Hawai'i Constitution and the Code expressly protect appurtenant rights. Haw. Const., art. XI, § 7; Haw. Rev. Stat. § 174C-63 (nothing in the Code "shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time"); Haw. Rev. Stat. § 174C-101(d). Under the Code, a permit for water based on an appurtenant right "shall be issued upon application." Haw. Rev. Stat. § 174C-63. The exercise of appurtenant rights are also a "public trust purpose," Waiāhole I, 94 Haw. at 137 & n.34, 9 P.3d at 449 & n.34, which the Commission has the affirmative duty to take "into account in the planning and allocation of water resources, and to protect . . . whenever feasible," id. at 141, 9 P.3d at 453. Further, the Commission is mandated to "determine appurtenant water rights, including quantification of the amount of water entitled to by that right, which determination shall be valid for purposes of [the Code]." Haw. Rev. Stat. § 174C-5(15).

The Commission, however, cannot fulfill its duty to consider and protect appurtenant rights in balancing the various WUPAs, much less issue WUPAs to applicants with appurtenant rights, without prima facie evidence showing that the applicant's land was entitled to water at the time of the Māhele, such as the Land Commission Awards, Royal Patents, Native Register, and foreign and native testimonies. See McBryde Sugar Co. v. Robinson, 54 Haw. 174, 188, 504 P.2d 1330, 1339 (1973) ("It is the general law of this jurisdiction that when land allotted by the Māhele was confirmed to the awardee by the Land Commission and/or when Royal Patent was issued based on such award, such conveyance of the parcel of land carried with it the appurtenant right to water for taro growing.").

Applicants claiming appurtenant rights, including Avery Chumbley, Robert Hanusa, Nadao Makimoto, Clayton Suzuki, and WWC, fail to provide any documentation establishing their claimed appurtenant rights, and should therefore be required to supplement their

applications with prima facie evidence of their rights before the Commission considers their claims.[2]

3. Meaningful alternatives analysis is required.

According to the Hawai'i Supreme Court, "besides advocating the social and economic utility of their proposed uses, permit applicants must also demonstrate the absence of practicable mitigating measures, including the use of alternative water sources. Such a requirement is intrinsic to the public trust, the statutory instream use protection scheme, and the definition of 'reasonable-beneficial' use, and is an essential part of any balancing between competing interests." In re Waiāhole Ditch Combined Contested Case Hr'g, 105 Haw. 1, 27, 93 P.3d 643, 669 (2004) ("Waiāhole II") (emphasis added).

The Community Groups note that many of the applicants without demonstrated appurtenant rights request to continue using Nā Wai 'Ehā water for landscaping and agriculture without proving the lack of practicable alternatives. For example, the applicants mentioned above and others, including Heinz Jung and Cecelia Chang, and Charles Dando, claim that municipal water is not available. As anyone with a garden hose knows, these statements are not accurate. Municipal water can be and is used to water lawns, gardens, and landscaping across the state, including in Nā Wai 'Ehā. Indeed, the proposed decision in the IIFS case observes that municipal water is an available alternative for most of WWC's users.

Further, documentation provided to this Commission during the IIFS contested case indicates that cost is not an issue for applicants such as Hanusa and Jung and Chang, who purchase water from Wailuku Water Company ("WWC") for $0.85 per 1,000 gallons, the same price Maui County charges for municipal water. Chumbley, Suzuki, and Dando, who are employees of WWC, receive their water for almost nothing or free. As the Court and this Commission have maintained, however, the Commission "is not obliged to ensure that any particular user enjoys a subsidy or guaranteed access to less expensive water sources when alternatives are available and public values are at stake." Waiāhole I, 94 Haw. at 165, 9 P.3d at 477 (citing the Commission). These applicants, who have no demonstrated rights to use stream water on their lands, provide no reason why they cannot use municipal water to satisfy their existing uses and, thus, fail to establish their uses are reasonable-beneficial.

B. Specific Objections.

The Community Groups object to the following WUPAs and request a hearing on these WUPAs pursuant to Haw. Rev. Stat. § 174C-53(a):

1. Hawaiian Commercial & Sugar ("HC&S").

The Community Groups object to HC&S's WUPAs for the two groups of fields it irrigates with Nā Wai 'Ehā water, the Waihe'e-Hopoi and 'Īao-Waikapū fields. As detailed

[2] As explained below, Mr. Suzuki has already admitted that his land does not have appurtenant rights. The Community Groups reserve the right to object to the other WUPAs based on any information provided documenting their appurtenant rights.

below, HC&S's request overreaches in every respect, inflating its cultivated acres and water duties, and failing to prove the lack of practicable mitigation and alternative sources. HC&S's deficient showing precludes it from meeting its legal burden under the public trust and Code of proving reasonable-beneficial use.

Preliminarily, the information HC&S provides in its WUPA is nothing new to the Commission, but largely rehashes what HC&S previously submitted in the IIFS proceeding in written and oral testimony -- with several exceptions where HC&S actually contradicts its previous sworn testimony. The Community Groups have extensively analyzed HC&S's uses elsewhere and for purposes of these objections will simply summarize this evidence, as well as point out the more blatant contradictions.

First, HC&S inflates its cultivated acres. For the Waihe'e-Hopoi fields, HC&S claims 4,408 acres, which contradicts HC&S's consistent representations from the beginning of the IIFS proceeding five years ago and through the contested case hearing that these fields comprise 3,950 acres total. Part of the increase is from HC&S's attempt to include the 301.6 acres of Fields 921 and 922 as part of the Waihe'e-Hopoi fields.[3] Fields 921 and 922 are sandy scrub land that HC&S never cultivated until free wastewater became available from Maui Land and Pine ("MLP"), and that HC&S opened specifically "to be a wastewater land application for [MLP's] wastewater." (Tr. 1/30/08 (Volner, HC&S), p. 27, ll. 24-25; p. 137, l. 24 to p. 138, l.1.) See Community Groups' Closing Br. (Offstream Uses) at 55-56 ("Closing Br."). Contrary to HC&S's WUPA, HC&S testified under oath that Fields 921 and 922 were irrigated "exclusively" by MLP water, and through 2007, that water "was sufficient." (Tr. 1/29/08 (Volner), p. 163, ll. 6-9; Tr. 1/30/08, p. 28, ll. 6-12; p. 139, ll. 18-23.) Nā Wai 'Ehā water is not available for HC&S to maintain its free wastewater disposal project on second-rate lands.

For the 'Īao-Waikapū fields, HC&S claims 1,491 acres, which likewise inflates the actual acreage. HC&S includes all 267.3 acres of Field 920, another sandy and unproductive field on which HC&S admitted pouring wasteful amounts of water between 10,000 and 14,000 gad for years. See Closing Br. at 53-55. Relevant to its claim of "existing use," HC&S phased Field 920 out of cultivation in 2007 and has left it fallow since. HC&S also includes 123 acres for Field 767, but it only recently began cultivating Field 767 during the IIFS contested case hearing and admitted that 89 acres of the field "will not be guaranteed any specific land lease term as development plans in this area are in progress." (Exh. A-212 at 3.) Thus, 267.3 acres of Field 920 is neither an existing use nor reasonable-beneficial, and the 89 acres of Field 767 slated for development warrant only a short-term, contingent allocation at best.

Second, HC&S overstates its water duties. It recycles the gad figures for 2004-06 that it produced in the IIFS contested case (6,826 gad for the Waihe'e-Hopoi fields and 7,098 gad for the 'Īao-Waikapū fields), which close scrutiny has discredited. HC&S claims that these figures resulted from "intensive effort," but such effort has only produced an endless string of shifting and contradictory numbers over the years, which, in the end, still contained a patent miscalculation of the amounts of MLP water that overstated HC&S's use of Nā Wai 'Ehā water by as much as 2.4 mgd. See Closing Br. at 43-46. These figures also alleged higher usage for the

[3] Even after subtracting the 301.6 acres of Fields 921 and 922, HC&S claims more than 150 acres in excess of 3,950 acres.

'Īao-Waikapū fields, contrary to HC&S's repeated acknowledgement that the Īao-Waikapū fields require less irrigation. See, e.g., Exh. A-141 at 21-22.

Instead of the faulty information HC&S produced, the Community Groups, OHA, and County of Maui requested Ali Fares, Ph.D. to calculate HC&S's optimal irrigation requirements based on the same methodology developed for and employed by this Commission. (Fares Written Testimony ¶ 2 (10/26/07); Exh. A-80.) These calculations remain the best -- and only -- substantive information to inform the Commission's duty to determine actual need as part of its comprehensive water management and allocation mission. Dr. Fares established that HC&S's actual need is 5,674 gad for the Waihe'e-Hopoi fields and 5,026 gad for the 'Īao-Waikapū fields without Field 920. See Exh. A-80 at 6-7; Community Groups' Proposed FOFs F-27, F-30. HC&S never justified any excess use beyond these optimal requirements.

Third, HC&S fails to prove the absence of practicable mitigation and alternatives, including minimizing waste from its leaky and inefficient system, and making good use of its supply of nonpotable water from Well No. 7. Although it admitted 9 to 12 mgd of system losses in the IIFS proceeding, HC&S "conservatively" requests only 9 mgd of losses in its WUPA, which it acknowledges still amounts to about a 25 percent loss rate. HC&S has never addressed any measures to mitigate these losses, including repairs, maintenance, and lining of ditches and reservoirs and, thus, has failed to justify any of these losses. See Waiāhole I, at 172-73, 9 P.3d at 484-85; Waiāhole II, 105 Haw. at 27, 9 P.3d at 669.

HC&S concedes that use of nonpotable groundwater from Well No. 7 is "physically feasible," but not its "preferred alternative." This Commission and the Hawai'i Supreme Court has already made clear that the Commission "is not obliged to ensure that any particular user enjoys a subsidy or guaranteed access to less expensive water sources when alternatives are available and public values are at stake." Waiāhole I, 94 Haw. 165, 9 P.3d at 477. HC&S used from Well No. 7 an average of 21 mgd, up to more than 30 mgd in some years, for half a century until "surplus" water became available after Wailuku Sugar ended sugar operations in 1988, and even after that continued to use substantial amounts when it chose to. See Closing Br. at 60-61. Thus, as HC&S admitted in sworn testimony, it is a "good generalization" that its nonuse of Well No. 7 is "simply an economic decision" (Tr. 1/30/09 (Volner), p. 120, ll. 15-18). Far from proving this alternative is impracticable, HC&S has merely shown its desire to maximize its profits by "minimizing" its use of Well No. 7 to nothing and exploiting "cheaper" Nā Wai 'Ehā water. See Closing Br. at 61-67.

HC&S's WUPA provides no information on the "lost revenues" to Maui Electric ("MECO"), but the Commission may note that these revenues now are just a fraction of the windfalls that HC&S received before reductions imposed by the state Public Utilities Commission. See OHA's Exceptions to Proposed Findings of Fact, Conclusions of Law, and Decision and Order at 15-16 (May 11, 2009). HC&S also quotes figures of $475,000 and $525,000 for additional equipment to supply Field 715 and booster pump an additional 14 mgd beyond the 14 mgd it already is equipped to use at present, but such figures have "little meaning without evidence and analysis of the actual per-unit breakdown of these costs relative to the cost of ditch water and other alternatives." Waiāhole I, 94 Haw. at 165, 9 P.3d at 477. In fact, even if taken as true, these figures pale in comparison to those that the offstream users quoted in Waiāhole, which ultimately reduced to small per-unit water costs that the Commission

deemed practicable. In this case, HC&S's figures reduce to mere pennies per thousand gallons of water, a small fraction of what other agricultural users pay. See Community Groups' Proposed FOF F-176. HC&S also quotes a figure of $777,650 to upgrade equipment to purchase power from MECO, but the sworn testimony of MECO refuted these costs as a "grocery list" that HC&S unilaterally made up without any MECO input. (Tr. 3/3/08 (Kauhi, MECO), pp. 63-74; Exh. C-83A; see Closing Br. at 65-66.)[4]

HC&S also fails to meet its burden to prove use of up to 5 mgd of reclaimed water available from the County's Wailuku-Kahului Wastewater Treatment Plant is impracticable, simply alleging that constructing delivery infrastructure would be "cost-prohibitive." Apart from the total lack of support, HC&S already admits using recycled water from a pipeline from MLP's Kahului cannery, which demonstrably refutes HC&S's conclusory claim and raises the alternative of extending this line to the County's plant. HC&S cannot dismiss this alternative while it deprives Nā Wai 'Ehā streams and their public users of their only alternative.

HC&S, for the first time in the years of these proceedings, requests an average of 1.5 mgd of uses for its mill, even though it admits that the mill uses water from multiple sources, and not just the Wai'ale Reservoir. If such a use is allowed any Nā Wai 'Ehā water at all (instead of, for example, Well No. 7 water, which has also historically been another source), it should be only be in the small proportion at which Nā Wai 'Ehā water supplies HC&S's overall uses.

2. Wailuku Water Company ("WWC").

The Community Groups object to WWC's WUPA for system losses from its ditch system of 3.17 mgd. WWC has not met its legal burden of establishing its actual need for such losses under economic and efficient conditions and the lack of practicable mitigation measures, including repairs, maintenance, and lining of ditches and reservoirs. See Waiāhole I, at 172-73, 9 P.3d at 484-85; Waiāhole II, 105 Haw. at 27, 9 P.3d at 669.

As WWC admits, it does not keep track of actual losses, but simply applies a set rate of 7.34 percent to whatever amount of water flows through the ditch. WWC bases this percentage on a consultant's report that is more than 20 years old. See WUPA, Table 1 Attach. No one can tell whether this information is still reliable after all these years, during which time the former Wailuku Sugar changed from a plantation engaged in active cultivation to a vestigial "water company" retaining only the ditch system and a skeleton crew. Also, WWC provides no indication how the loss rate changes depending on the level of ditch flows, which usually occurs with unlined systems. Such information is particularly important since WWC cannot presume it will be able to continue its historical wholesale diversions of Nā Wai 'Ehā streams.

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[4] The Community Groups point out one more misrepresentation by HC&S that use of Well No. 7 water "would require the use of an additional amount of ditch water" to flush salts, which contradicts its sworn testimony that ditch water, well water, or rain water would all suffice for such purposes. (Tr. 2/20/08 (Nakahata, HC&S), p. 9, ll. 10-13; p. 96, ll. 7-9; p. 97, l. 21 to p. 98, l. 11.)

WWC's attempt to rely on assumption and speculation to quantify its losses is unacceptable. The Commission should require the offstream users, including WWC and HC&S as the ditch operators, to institute a comprehensive scheme of flow monitoring and provide current, accurate, and reliable information on all end uses, as well as system losses.

Moreover, WWC fails to meet the burden of proving the lack of practicable mitigation. WWC "analysis" of alternatives simply recites the same one-line, stock responses as all of its customers, which have nothing to do with the particular issue of system losses. Although it provides no information in its WUPA, in the IIFS proceedings, WWC revealed the vast majority of its ditches and all of its reservoirs are unlined. Yet, it does nothing to address the practicability of measures to minimize waste, including lining its system.

In fact, evidence in the IIFS proceeding indicated that many of WWC's reservoirs serve no meaningful storage function and simply fill up and waste water through evaporation and seepage, since many of its smaller end users could simply take directly from the ditch system (as does one of WWC's largest customers, the Maui County Department of Water Supply). See Community Groups' Closing Br. at 7, Proposed FOFs E-37, -38, COLs 194-95. For example, WWC has kept Reservoir 9, the end point of its system, filled and often overflowing down Pōhākea Gulch in Ma'alaea, without any large volume user to justify such a practice. Other reservoirs similarly could be better managed or shut down to conserve limited Nā Wai 'Ehā water. The Commission is duty-bound to monitor and account for any and all losses from the ditch system, Waiāhole II, 105 Haw. at 27, 9 P.3d at 669; the comprehensive monitoring system mentioned above is the necessary and appropriate tool for the Commission to fulfill this duty.

Finally, WWC claims appurtenant rights for its water use, but apart from the lack of any support for this claim, the law makes clear that appurtenant rights must be exercised only on the specific parcel to which the right is appurtenant. We also note that WWC's indication in Exh. B of its WUPA that the land uses on several of its parcels require conservation district use permits, which it has "not acquired," raises the question whether it should acquire such permits for its operations.

3. MMK Maui, LP ("MMK").

The Community Groups object to MMK's WUPA for golf-course and landscaping irrigation because it fails to meet the "heavy burden" MMK bears under the law to show why stream water should be diverted out of its watershed of origin for such purposes. Waiāhole I, 94 Haw. at 168, 9 P.3d at 480 (citing the Commission).

Initially, MMK's requested allocation of 1,292,704 gpd exceeds its actual need, which the evidence produced in the IIFS proceeding established as less than 1.2 mgd. It bears noting that, in sworn testimony to this Commission, MMK claimed the "amount of water necessary" was between 1.6 and 2.2 mgd, see Declaration of B. Russell Dooge ¶ 12 (Sep. 14, 2007), which further inquiry exposed as a gross exaggeration. MMK's 1.29 mgd figure appears to be similarly overstated.

The Community Groups have detailed the evidence on MMK's actual need elsewhere and simply summarize here for the Commission's reference. See, e.g., Community Groups'

Closing Br. (Offstream Uses) at 14-15; Proposed FOFs E-57 to -66. MMK admitted that during 2006, which was the first full year of irrigation on both courses, it used 1.2 mgd, but this overstated actual need because for the first several months, it was still growing in the grass on the courses and "throwing a lot of water down," "more than normal." Similarly, MMK agreed that the 1.2 mgd figure the Office of State Planning reported for the courses' predecessors (the former Waikapū and Sandalwood courses) was accurate, except that MMK's new irrigation and monitoring system has resulted in greater efficiency and lower water use rates than before. Thus, MMK has already admitted that less than 1.2 mgd should be sufficient for efficient, reasonable-beneficial use on its golf courses.

MMK also fails to meet any burden, let alone a heavy burden, of showing the lack of practicable mitigation and alternatives. Its "analysis" of alternatives resorts simply to the one-line, stock responses common to all of WWC's customers and does not even begin to show why the use of groundwater or reclaimed water, for example, would not be feasible to conserve limited Nā Wai 'Ehā water. It also fails to address the feasibility of conserving water by using less water-intensive landscaping and turf grass. The mere existence of its agreement with WWC does not vitiate its legal burden to prove reasonable-beneficial use.

4. Waiolani Mauka Community Association ("WMCA").

The Community Groups object to WMCA's WUPA because WMCA has failed to meet its "heavy burden" to prove its use for landscaping irrigation is reasonable-beneficial. Waiāhole I, 94 Haw. at 142, 168, 9 P.3d at 480. WMCA requests 75,465 gpd on its 2-acre park and 0.5 acres of common areas and street islands, or 30,186 gallons per acre per day ("gad"). To justify its request, WMCA points out that this use of stream water is for a "county required public park" and "county required street trees." This rationale is a non-sequitur. First, as Maui County Department of Water Supply Director Jeffrey Eng made clear during the IIFS contested case, the County does not have a policy to encourage new subdivisions to use surface water for irrigation, and his department does not encourage such use. (Tr. 12/14/07 (Eng), p. 147, l. 24 to p. 148, l. 5.) Second, WMCA's request for 30,186 gad is over 13 times more than the 2,217 gad requested by Kihei Garden and Landscaping Company, a commercial landscaping company in the same Waikapū area where Waiolani Mauka subdivision is located. WMCA's grossly inflated claim clearly is not "necessary for economic and efficient utilization" and its WUPA must be rejected. Waiāhole II, 105 Haw. at 15, 93 P.3d at 657 (quoting Haw. Rev. Stat. § 174C-3).

WMCA has also failed to "demonstrate the absence of practicable mitigating measures, including the use of alternative water sources[.]" Waiāhole I, 94 Haw. at 161-62, 9 P.3d at 473-74. WMCA makes conclusory statements that alternatives are not available, but fails to provide any analysis and support. For example, WMCA states that "[w]ater for non potable use is not available from the municipal source," but provides no documentation that it has even attempted to access municipal water for its common areas and park. WMCA also fails to explain why it cannot recycle wastewater generated within the subdivision or use a rainwater catchment system. Further, WMCA fails to explain why it cannot mitigate its excessive use by, for example, installing alternative irrigation methods that would reduce water usage, such as drip irrigation in its park, by planting drought-tolerant grasses and landscaping plants that would require less water, or by using sensors so that sprinklers go off only when the soil

requires irrigation. Because WMCA has failed to prove that the amount of water requested is necessary and that it lacks practicable alternatives, the Community Groups object to its WUPA.

5. Clayton Suzuki, et. al.

The Community Groups object to Mr. Suzuki's WUPA. The WUPA claims appurtenant rights, which directly contradicts Mr. Suzuki's own sworn admission that his land does not have appurtenant rights, as well as evidence before this Commission that any rights were extinguished when Wailuku Agribusiness sold him the land. (Tr. 12/14/07 (Suzuki), p. 142, l. 23 to p. 143, l. 17; Exh. A-151.) Moreover, Mr. Suzuki takes water from the "Reservoir 1" 'auwai first, before bona fide appurtenant rightholders on the 'auwai can access the water, thus potentially interfering with the rights of these kuleana users. See Santiago Written Testimony ¶ 7 (10/26/07); Tr. 12/7/07, p. 106, ll. 9-20; p. 114, ll. 1-6; Tr. 12/14/07 (Suzuki), p. 140, l. 1 to p. 141, l. 6. Mr. Suzuki's WUPA fails to show that his use can continue without infringing on the appurtenant rights of others. See Waiāhole I, 94 Haw. at 143, 9 P.3d at 455 ("The burden of demonstrating that any transfer of water was not injurious to the rights of others rested wholly upon those seeking the transfer.") (quoting Robinson, 65 Haw. at 649 n.8, 658 P.2d at 295 n.8). Because Mr. Suzuki has no appurtenant rights and has failed to show that his withdrawal of water does not harm the rights of bona fide kuleana users downstream of his intake, the Community Groups object to his WUPA.

Thank you for this opportunity to comment. We appreciate your consideration of these comments and objections and your efforts to protect irreplaceable public trust resources for present and future generations.

Very truly yours,

D. Kapua'ala Sproat
Isaac H. Moriwake
Koalani L. Kaulukukui
Attorneys for Hui o Nā Wai 'Ehā and
Maui Tomorrow Foundation, Inc.

cc: John V. Duey, Hui o Nā Wai 'Eha (via email)
Irene Bowie, Maui Tomorrow Foundation, Inc. (via email)
Garrett Hew (HC&S) (via First Class U.S. mail)
Clayton Suzuki (WWC) (via First Class U.S. mail)
Jodi Shin Yamamoto (MMK) (via First Class U.S. mail)
Scott Nunokawa (WMCA) (via First Class U.S. mail)

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
HONOLULU, HAWAII 96809

April 29, 2009

Ref.: SWUP.2153.6, SWUP.2155.6, SWUP.2156.6, SWUP.2157.6, SWUP.2164.6, SWUP.2182.6, SWUP.2186.6, SWUP.2188.6, SWUP.2191.6, SWUP.2192.6, SWUP.2205.6, SWUP.2206.6, SWUP.2207.6

TO: Other Interested Parties

FROM: Ken C. Kawahara, P.E., Deputy Director
Commission on Water Resource Management

SUBJECT: Request for Comments
Surface Water Use Permit Application – Existing Uses
Na Wai Eha Surface Water Management Areas, Maui

In addition to serving you notice as required by 174C-52 (a), Hawaii Revised Statutes, we transmit for your review and comment copies of a surface water use permit applications for various existing uses of water from the Na Wai Eha Surface Water Management Areas. Public notice of these applications will be published in the Maui News issues of May 4, 2009, and May 11, 2009.

We would appreciate your review of the attached applications for any conflicts or inconsistencies with the programs, plans, and objectives of the organization or agency that you represent. Written objections should be made in accordance with Section 13-171-18, Hawaii Administrative Rules and must be filed by the May 26, 2009 deadline. If we do not receive your comments by this date, we will assume you have no objections to these applications.

If you have any questions, require additional information, or would like to request an extension of the review period for these applications, please contact Robert Chong at (808) 587-0266, or toll free from Maui at 984-2400, extension 70266.

Attachment(s)

Response:

( ) We have no objections or comments
(X) Objections attached
( ) Only comments attached

FILE ID: SWUP. 2153.6
DOC ID: 3720

Contact person: Isaac Moriwake Phone: 599-2436

Signed: [signature] Date: 5/26/09